



December 9, 2008

Hon. Ross Johnson, Chairman  
Commissioner Ray Remy  
Commissioner Eugene Huguenin IV  
Commissioner Robert Leidigh  
Commissioner Tim Hodson  
Fair Political Practices Commission  
428 J Street, Suite 620  
Sacramento, CA 95814

Re: FPPC Proposed Regulation 18521.5 – Agenda Item #16

Dear Chairman Johnson and Commissioners:

The California Republican Party joins in the comments of Frederick A. Lowell, Esq., and Lance H. Olson, Esq., opposing Proposed Regulation 18521.5 – Agenda Item #16.

The proposed regulation would require all state-candidate controlled ballot measure committees to become “primarily formed” committees under the Political Reform Act (“PRA”), would impose blackout periods during which state candidates could not establish a ballot measure committee unless they met specified conditions, and would impose limitations on contributions to such committees. The regulation appears to be inconsistent with the PRA, and raises serious constitutional questions. See *Citizens to Save California v. Fair Political Practices Commission* (DCA 3, 2006) 145 Cal.App.4th 736; *California Republican Party, et al. v. Fair Political Practices Commission* (E.D. Cal. Oct. 27, 2004) (CIV-S-04-2144 FCD PAN) (Unreported) (“*CRP v. FPPC*”).

First, the proposed regulation would require any state-candidate controlled ballot measure committee to identify as “primarily formed,” whether or not that committee is actually “primarily formed” under Gov. Code section 82047.5(d).<sup>1</sup> Under that statute, a committee is “primarily formed” when it is “formed or exists primarily to support or oppose . . . : (d) Two or more measures being voted upon in the same city, county, multicounty or state election.” However, a “general purpose committee” is defined in

<sup>1</sup> Draft Regulation 18521.5(a) appears to make reference to another regulation, 18247.5 that does not appear in printed or website compilations of Commission regulations.

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Government Code section 82027.5 as any committee that is not "primarily formed." This regulation would require candidate-controlled ballot measure committees that would qualify as "general purpose committees" to identify as "primarily-formed," and to follow other rules related to "primarily formed" committees even when they are not.

Second, although the regulation does not explicitly reference the "top two donor" disclaimer rules of Government Code section 84503, we assume that a state candidate controlled "primarily formed" ballot measure committee would be subject to that statutory requirement if the regulation is adopted. As the Commission is aware, the California Republican Party and two other political party committees obtained permanent injunctive relief against the application of this rule to political party committees and other general purpose committees in *CRP v. FPPC, supra*.

Third, the rule would provide blackout periods for the establishment and operation of such candidate-controlled ballot measure committees. There is simply no basis in the PRA or the constitution for this approach. Moreover, the rule would prohibit non-proponent candidates from undertaking any activity to organize, raise funds for and authorize expenditures for such a committee based upon whether another proponent, whether that proponent was a state candidate or not, had acted or failed to act. Again, there is no justification for such a rule under constitutional standards, where the regulation would be subject to strict constitutional scrutiny under which the Commission would be required to demonstrate that the regulation is narrowly tailored to serve the governmental interest of preventing corruption or its appearance. See, e.g., *California Pro-Life Council v. Randolph*, 507 F.3d 1172, 1177 (9<sup>th</sup> Cir. 2007).

Fourth, the regulation (at subdivision (c)) appears to be inconsistent with another Commission regulation. See 2 CCR 18531.10(c).

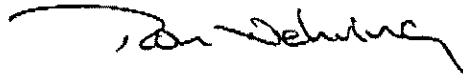
Fifth, subdivision (f)(1) permits a committee to spend funds for "committee overhead support and compliance costs" and omits "fundraising costs." There is no reason to exclude fundraising costs from permissible expenses. See, e.g., Elections Code section 18680 (d)-(j).

We appreciate the Commission's desire to clarify rules applicable to state candidate activity, but do not believe the PRA provides a blank check – absent legislative or constitutional authorization – to regulate as proposed.

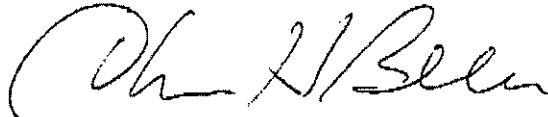
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Charles H. Bell, Jr. will be available to comment at the December 11, 2008  
Commission meeting.

Very truly yours,



Ron Nehring, Chairman



Charles H. Bell, Jr., General Counsel